IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1084 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE OF GUJARAT – Appellant

Versus

M/S ASHOKUMAR SHITALDAS FIRM & 3 - Respondents

==========

Appearance :
Mr. K.C. SHAH, LD. APP for Appellant
MR MK OZA for Respondents: 1 - 3.
MR KR RAVAL for Respondent: 4.
==========

CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 20/09/2005

ORAL JUDGMENT

1.The appellant State of Gujarat has preferred the present appeal under section 378 of the Code of

Criminal Procedure, 1973 challenging the order of acquittal dated 26/9/1995 passed by learned JMFC, Deesa, in Criminal Case No. 557 of 1983, acquitting the accused of the charges under section 7 and 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the 'Act'). This Court (Coram: A.N. Divecha, J) admitted the appeal vide order dated 9/1/1997.

2. The record shows that this Court (Coram: D.H. Waghela, J) on 18/7/2002 passed an order that the appeal would abate as far as the Respondent no.2 – Shitaldas Hotchand is concerned, as he has died. The appeal was ordered to be fixed for final hearing in respect of other original accused No.1 and 3 – Respondents No. 1 and 3 in regular course.

3. The case of the prosecution in short is that the original complainant Food Inspector / Respondent No.4 while serving as such, visited the shop of the accused on 16/10/1982. On 16/10/1982 accused no.2 and 3 were present in the shop and were selling the edibles like peppermint etc. After introducing himself as Food Inspector and notifying his intention of purchasing

sample food article of peppermint for analysis, he purchased 900 grms of peppermints which was described in local parlance as “Penda”. The notice under Rule 12 in Form VI notifying his intention to send the food article for public analysis was issued then and there, and the same was countersigned by the accused no.2. The complainant made payment for the sample food article and obtained the receipt thereof. The receipt is produced at exhibit-19. The bill for purchasing the sample food article is at exhibit-20. The sample food article was divided into three equal parts and collected in a clean, dried, odorless plastic bags. The bags were sealed strictly in accordance with law and the duly filled-in slips were affixed thereon. The entire procedure of collecting sample food into three parts and sealing three sample parts and affixing proper seal etc., were done in presence of panch witness and panchnama was drawn in accordance with law. The panchnama is produced at exhibit-76. The memorandum in Form VII was prepared and one part of the sample food article was sent to the Public Analyst for the purpose of analysis and the specimen of seal used for sealing the container and the memorandum were sent separately by registered post to the Public Analyst.

The relevant documents have been produced at exhibit-21, 22 and 23. The remaining two parts of the sample food articles were sent to Local Health Authority as required under law. As the food sample was found to be adulterated on account of presence of non permitted rhodemine B coaltar dye as stated in the report of the Public Analyst dated 12/11/1982 which is at exhibit-29, necessary permission from Local Health Authority was obtained for lodging the prosecution against the accused. The concerned Local Health Authority after perusing the record and material and the report of the Public Analyst issued necessary permission for lodging the prosecution which is produced at exhibit-30. After lodging the complaint the intimation was sent to the Local Health Authority so that Local Health Authority may issue requisite notice under section 13(2) to the accused. A copy of the letter dated 31/3/1983 is at exhibit-31 informing the said authority. The Local Health Authority issued notice on 4/4/1983 in due compliance with section 13(2) of the Act informing the accused that they have a right to make an application within ten days to the court for having the sample further tested at Central Food Laboratory. This notice also, as stated by the complainant, was duly served

upon the accused.

4. The learned Magistrate has framed two issues; namely (1) whether the prosecution proves beyond doubt that the accused have committed offence under section 7 and 16 of the Prevention of Food Adulteration Act, for keeping the peppermint which were not in conformity with the standards laid down in law ?, and (2) what order ?.

The first issue is answered in negative and the second, as per order of the trial court.

5. The trial court has accorded benefit of doubt to the accused on the ground that the exhibits 93 and 94, copies of bills were sufficient to believe that the accused has purchased the food article from Rajesh Stores and the benefit of warranty under section 19(2) was available to the accused.

6. Heard Shri. K.C. Shah, learned APP, Shri. K.R. Raval, for the State and Deesa Nagarpalika respectively and Shri. Oza for the respondents / accused No.1 and 3. The counsels for the appellant and respondent no.4 –

original Food Inspector, Deesa Nagarpalika have submitted that the order of the trial court is ex facie erroneous and seems to have proceeded on the misconception of law and, therefore, the same deserves to be quashed and set aside. Shri. Oza, learned counsel appearing on behalf of accused no.1 and 3 i.e. Respondents no. 1 and 3 has submitted that the present appeal stands abated. Shri Oza has submitted that this Court has already taken note of the fact that original accused no.2 has died and therefore, the appeal qua him was ordered to be abated. Shri. Oza submits that this being a joint appeal wherein all the three accused have been joined as respondents, on death of one of the accused the entire appeal should abate. That the death of one accused may result into abatement of the appeal in respect of rest of the accused. The appeal against respondent no.1 and 3 therefore can not survive. In support of his submission Shri. Oza has relied upon the ruling of the Apex Court in case of STATE OF MAHARASHTRA Vs. EKNATH YESHWANT PAGAR AND ANOTHER, reported in AIR 1981, S.C. pg. 1571. Shri. Oza submits that the Apex Court has held that as the appeal was abated against main accused on account of his death, the appeal against other accused becomes infructuous

and the same was accordingly disposed of. Relying upon the said ruling of the Apex Court Shri. Oza submits that in the instant case also original accused no.2 – respondent no.2 herein has died and this Court has ordered abatement of appeal qua respondent no.2 and, therefore the appeal against other two respondents namely respondent no.1 the firm and Gurdas Asumal Khatri, respondent no.3 shall also abate. Shri. Oza has also relied upon the ruling of this Court in case of THE STATE Vs. AMRATLAL MAGANLAL AND ANOTHER, reported in AIR 1962 GUJARAT, Pg. 261. Shri. Oza submits that in absence of any application for separating the appeal, the appeal as it is can not be proceeded further against surviving accused.

7. Shri. Shah,learned APP for the appellant has submitted that the appeal qua original accused no.2 / respondent no.2 Shitaldas Hotchand would certainly abate and it has rightly been ordered to be abated. However, the acquittal appeal in respect of original accused no.1 and 3 / respondent no.1 and 3 may continue and that they may not be considered to have been abated. Shri. Shah has submitted that the rulings cited by Shri. Oza in case of State of Maharashtra Vs. Eknath Yeshwant

Pagar (supra) does not lay down any proposition that in an acquittal appeal filed against 2 to 3 accused, if one accused is died, then, the entire appeal shall stand abated. Such proposition of law would result into miscarriage of justice. Shri. Shah has submitted that there is no need to separate or notionally separate the appeal in respect of surviving two accused namely respondent no.1 and 3. Shri. Shah has submitted that the reliance placed by Shri. Oza upon the ruling in respect of The State Vs. Amratlal Maganlal (supra) is ill founded and misconceived. Shri. Shah has invited this Court's attention to the ruling of the Full Bench in case of LALU JELA AND ORS Vs. STATE OF GUJARAT, reported in AIR 1962 GUJARAT pg. 125 in support of his contention that the reliance placed by Shri. Oza in case of The State Vs. Amratlal Maganlal (supra) is misconceived. Shri. Shah therefore submits that the appeal vis-a-vis surviving accused can not be treated to have been abated. Shri. Shah has submitted that the Apex Court has unequivocally negatived this principle in the case of THE STATE OF GUJARAT Vs. RAMPRAKASH P. PURI AND OTHERS AND THE STATE OF GUJARAT Vs. SATU KHAYALDAS AND OTHERS, REPORTED IN 1969 (3) SCC PG. 156. Shri. Shah submits that, in view of the

observations of the Honourable Supreme Court the reliance upon the decision of the Division Bench in case of The State Vs. Amratlal Maganlal (supra) was clearly misconceived and of no avail to the accused / respondents no.1 and 3. Shri. Shah has further submitted that the Division Bench decision of Patna High Court in case of RAM ISHWAR CHAUDHARY AND ORS Vs. THE STATE OF BIHAR, reported in 1986 Cri.L.J. 1366 held that in case of acquittal appeal against the accused, the appeal would abate in respect of deceased accused only and not as whole. The conviction recorded against deceased accused would be void, the appeal would not become infructuous with regard to other accused. Shri. Shah has further relied on a decision in case of STATE Vs. JOAO SALDANHA AND ORS, reported in 1968 Cri.L.J. 992, that appeal shall proceed in respect of the surviving accused. The death of one of the accused respondent shall not result into abatement of entire appeal and there is no necessity to separate the appeals.

8. Shri. Raval appearing for Deesa Nagarpalika submits that the judgment & order of the trial court impugned in the present appeal is patently erroneous and so

perverse that it has resulted into miscarriage of justice. The accused have been given benefit of section 19(2) read with section 14(2)as if they are having any cogent evidence in respect of warranty. Shri. Raval has submitted that the order of learned Magistrate acquitting the accused is bereft of cogent reasons and therefore the same deserves to be reversed. Shri. Raval has submitted that the so called bill at exhibit-93 and 94 in th first instance could not have been exhibited at all as they are not proved. Shri. Raval has invited this Court's attention to the record wherein it appears that xerox copies of the bill no. 193 and 347 have been produced which have been exhibited at exhibit-93 and 94. The bill at exhibit-93 and 94 could not have been taken on record as before exhibiting the same, they were required to be duly proved. Shri. Raval has submitted that the bill at exhibit-93 and 94 bearing No. 193 and 345 respectively do not suggest that the sample food article was purchased by the accused from M/s. Rajesh Stores. The bill purported to have sold some articles but the article in question in the present proceeding is described as 'Penda Goli' i.e., peppermint and nowhere said description is found in the bills produced at exhibit – 93 and 94. Shri. Raval has

further submitted that the accused have chosen not to examine themselves, and as it is appearing from the record the copy of th two bills seems to have been brought on record along with the further written statement produced on behalf of accused no.2 and 3. The date of further statement is 14/9/1995 and the closing purshish was also given on 14/9/1995. In view of this, it can be said that the burden cast upon the accused to prove that the food article was purchased from the manufacturer or dealer and it was sold in the same condition was not discharged by the accused. Therefore the benefit of warranty under section 19(2) can not lightly to be accorded to the accused as it has been done in the present case.

9. Heard the learned counsels for the respective parties, perused the record and proceedings. The first contention of Shri. Oza, learned counsel appearing on behalf of respondents no.1 and 3 deserves to be dealt with first. Shri. Oza's submission that the accused no.2 Shitaldas Hotchand is died, therefore, the entire appeal shall stand abated against remaining accused can not be accepted. Shri. Oza has relied upon the judgment of the Apex Court in case of State of Maharashtra Vs.

Eknath Yeshwant (supra) in support of his submission that on the death of main accused the acquittal appeal in respect of other accused would stand abated. This judgment could be of no help to the accused no.1 and 3. The facts deserves to be noted that the matter before the Apex Court was on an entirely different facts & circumstances. In the case before the Apex Court both the accused were acquitted by the High Court and the appeal abated against first respondent on account of his death. The second respondent who was acquitted, appeal against him was said to be infructuous as he was merely an abettor. In the instant case, looking to the scheme of the PFA Act, the accused no.1 and 3 on their ownstead could be said to be responsible for the offence charged against them. Their role can not be said to be merely of that of an abettor and, therefore, the ruling of the Apex Court would be of no avail to accused no.1 and 3.

10. The reliance of Shri. Oza on the ruling of the Division Bench in case of State Vs. Amratlal Maganlal, 1962 Gujarat, 261 was obviously misconceived in law in view of the observations of the Full Bench judgment in case of Lalu Jela and Ors Vs. State of Gujarat, AIR

1962 Gujarat pg. 125; and also in the ruling of the Apex Court in case of The State of Gujarat Vs. Ramprakash P. Puri and others, 1969(3) SCC pg.156.

11. It is required to be observed that in case of State Vs. Joao Saldanha and ors,1968 Cri.L.J. 992 (Goa, Daman & Diu, J.C's Court) the Court in terms held that in case of death of co-accused in the acquittal appeal, the appeal will survive in respect of surviving accused and the entire appeal shall not abate. Same view was taken by division Bench of Patna High Court in case of Ram Ishwar Chaudhari & Ors Vs. The State of Bihar, in 1986 Cri.L.J. pg.1366. In view of these, the submission of Shri. Oza that the entire appeal stands abated deserves to be rejected. Shri. Oza's reliance on the Apex Court decision in case of case of KHEDU MOHTON AND ORS vs. STATE OF BIHAR, reported in AIR 1971 SC pg.66 is also misconceived. In that case it is stated that the appeal under section 417 can only abated on the death of the accused and not otherwise. This observation would not help the surviving accused, namely accused no.1 and 3. The wording employed can not be construed to include the surviving accused also.

12. The trial court has proceeded on the footing as if the burden of proving the warranty was discharged by the accused. In fact provision 19 (2) casts burden upon the person claiming the benefit under section 19(2) to prove that he has purchased the food article with a warranty in the prescribed form and that the food article while in his possession was sold in the same set of condition in which he has purchased the same. In the present case it can not be said that the accused have discharged their burden. Mere production of two xerox copies of bills not containing any specific description of food article can not be said to be discharging of burden so as to enable them to get benefit of section 19 (2). In view of this, this court has no hesitation in coming to the conclusion that the order of the trial court is perverse and has resulted into miscarriage of justice. It is important to note that the trial court has misdirected itself and therefore proper issues have not even been framed. The trial court has not addressed itself to the relevant issues in the matter. Therefore it wold be in the interest of justice that the matter be remanded back to the trial court for recording its appropriate findings. Thus the impugned judgment of the trial court

is quashed and set aside.

13. In the result, the appeal is partly allowed, and the matter is remanded to the trial court in respect of ori. Accused No. 1 and 3, for fresh decision on the available evidence on record. The trial court is directed to decide the matter within a period of six months from the date of receipt of writ of this Court. Registry is directed to send the R & P forthwith to the trial court.

[S.R. BRAHMBHATT, J]

/vgn